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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

No.

Tip Top Farms, Inc.,

Petitioner,

against

Dairylea Cooperative, Inc.,

Respondent.

Jerome Dairy Co., Inc.,

Petitioner,

against

Dairylea Cooperative, Inc.,

Respondent.

Park Lane Dairies, Inc. and
Park Dale Dairies, Inc.,

Petitioners,

against

Dairylea Cooperative, Inc.,

Respondent.

Petition for a Writ of Certiorari To
The New York State Court of Appeals

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March 10, 1987

QUESTIONS PRESENTED

Plaintiffs, who are milk dealers, brought actions in the Supreme Court, State of New York, against defendant to recover a pro rata share of money received by defendant as a claimant in a federal antitrust action brought against manufacturers of cardboard milk containers. Plaintiffs claimed that defendant had resold the containers to them in connection with their purchase of processed milk for resale. Plaintiffs alleged that the containers in which the milk was packaged were resold at cost pursuant to a pre-existing requirements agreement. Defendant had included those containers in its claim in the antitrust action. Plaintiffs proceeded on theories of breach of contract and money had and received. In affirming the dismissal of plaintiffs' contract claims, the New York State Court of Appeals, by a 4-3 majority, adopted the opinion of the New York State Supreme Court, Appellate Division, Second Department, holding that Congress has pre-empted states from applying state contract law principles to this dispute. The Court also held 4-3 that plaintiffs did not fall within the exception to *Illinois Brick v. Illinois*, 431 U.S. 720, reh denied 434 U.S. 881 (1977) which exception allows indirect purchasers to recover for federal antitrust violations if the indirect purchaser had a pre-existing cost or cost plus agreement. In the instant case the Court held that while plaintiffs were contractually bound to buy all their requirements of milk and cartons from defendant, they did not contract to buy a fixed quantity.

1. Has the Congress of the United States pre-empted state courts from applying common law contract principles to an action by a purchaser of goods against its seller, to recover a pro rata portion of the seller's recovery in a federal antitrust action against the manufacturer?

2. Does an exception exist to the U.S. Supreme Court decision in *Illinois Brick v. Illinois* which allows an indirect purchaser of goods, who has purchased the goods at cost under a pre-existing requirements agreement, from a direct purchaser, to recover as its damages a portion of the antitrust damages the direct purchaser has already been able to recover from the manufacturer?

3. Does federal antitrust policy apply to a state court action between two contracting parties for breach of contract where the amount in controversy originates with the receipt by one of a federal antitrust recovery? If so, does it bar such an action?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties.

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Petition for a Writ of Certiorari To
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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Tip Top Farms, Inc., Jerome Dairy Co., Inc., Park Lane Dairies, Inc. and Park Dale Dairies, Inc. respectfully pray that a writ of certiorari be issued to review the opinion and order of the New York State Court of Appeals rendered in these proceedings on December 16, 1986.

OPINIONS BELOW

1. The opinion of the New York State Court of Appeals dated December 16, 1986, reported at 69 N.Y.2d 625, ——— N.Y.S.2d——— appears in "Appendix A".

2. The opinion of the New York Appellate Division, Second Department, reported at 114 A.D.2d 12, 497 N.Y.S.2d 99 (1985), dated December 30, 1985 appears in "Appendix B".

3. The opinion of the New York State Supreme Court, Special Term, Part I, Queens County dated January 18, 1983 which is unreported appears in "Appendix C".

JURISDICTION

The order of the New York State Court of Appeals was entered December 16, 1986. See Appendix A. This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). This action concerns the question of whether a state common law cause of action has been pre-empted by a federal statute. *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983).

STATUTORY PROVISIONS INVOLVED:

Clayton Act Section 4 (15 U.S.C. 15) provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the

antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF FACTS

Plaintiffs, wholesale milk dealers, contracted with defendant, a milk processor for the exclusive purchase of their requirements. The agreements which were oral were made at various times between 1967 and 1973. The price for each finished container of milk was to consist of three elements; the price for raw milk set by the federal milk market administrator for the New York, New Jersey milk marketing area, a negotiated cost for processing, pasteurizing, packaging and loading designed to afford defendant a profit, and the cost of paper cartons into which the milk was packaged at defendant's cost with a one per cent allowance for plant loss. Defendant purchased plaintiffs' cartons from manufacturers together with purchases for its own wholesale customers and with cartons for other wholesale customers similarly situated. Park Lane, Park Dale and Jerome's containers were preprinted by the manufacturers with their names on it and were not usable by defendants. All price increases, decreases, rebates, discounts, etc. given to defendant by the carton manufacturers were to be passed along to plaintiffs pro rata in conformity with the agreement and trade usage in the milk industry in New York City. Each of the contracts was terminable at will.

Jerome did business with defendant until 1977, Tip Top until 1980 and Park Lane and Park Dale until 1981. All price increases and decreases in the cost of containers were immediately passed on to said plaintiffs.

In 1976, several customers of carton manufacturers commenced an antitrust action in the U.S. District Court for the Northern District of Illinois which certified a class consisting of direct purchasers from the manufacturers. *In Re Folding Carton Antitrust Litigation*, 75 FRD 727. A settlement fund of $200,000,000 was distributed to customers of the defendant manufacturers. Customers were allowed to choose any four years between 1960 and 1974 as the basis of their claim. Defendant chose the years 1971 to 1974 and included in the claimed purchases those cartons resold to plaintiffs at cost. Defendant received approximately 1.2 million dollars as its distributive share in April 1980. Plaintiffs did not learn of the antitrust action or defendant's receipt of said amount until after the fact. Plaintiffs promptly commenced this action in 1980 seeking a pro rata share of defendant's antitrust recovery on the theories of breach of contract and money had and received.

During the discovery process, defendant moved for summary judgment and plaintiffs cross moved for summary judgment. Defendant's motion was granted and the actions were dismissed insofar as these claims were concerned upon the ground that the matter turned on a policy enunciated in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) which barred indirect purchasers from suing manufacturers for antitrust overcharges with certain limited exceptions. One of the exceptions enunciated in *Illinois Brick* is the situation of a cost or cost plus agreement. The decision of the trial court was affirmed 3-1 by the New York State Appellate Division,

Second Department. The dissenting opinion stated that the strictures of *Illinois Brick* do not apply to the consideration of this state court common law claim, reasoning that there has been no indication by Congress that it has pre-empted the field and imposed an obligation upon states to deny access to the state courts on contract and money had and received theories. The majority also held that the exception to *Illinois Brick* allowing an action by a person with a pre-existing contract to purchase the goods at cost does not apply to requirements agreements. The New York State Court of Appeals affirmed by a vote of 4-3 in which the majority simply adopted the decision below and the minority adopted Justice Leon Lazers' dissent.

The federal questions sought to be reviewed were raised in defendant's motion for summary judgment made after the service of its answer on August 31, 1982 before the trial court. Said question was the basis for the dismissal of the action by the trial court, and the basis of the decisions of both the Appellate Division, Second Department and New York State Court of Appeals, each of which affirmed the determination of the trial court dismissing the action.

REASONS FOR GRANTING THE WRIT

1. The State Court has decided an important question of federal law in a way in conflict with applicable decisions of this Court and in conflict with applicable decisions of a federal court of appeals.

As a necessary incident of the majority holding, the New York State Court of Appeals has determined that the Clayton Act, as applied by this Court and various other federal courts, has pre-empted the right of states to entertain actions based

upon common law principles of breach of contract and money had and received if a plaintiff seeks to enforce his contractual right to a portion of a recovery in a federal antitrust action.

The Clayton Act, the policies enunciated in *Illinois Brick Co. v Illinois*, 431 U.S. 720, reh. denied, 434 U.S. 881 (1977) and the cases which follow it do not so preclude state courts from adjudicating common law contract disputes. In *Illinois Brick Co. v. Illinois* this Court considered the right of an indirect purchaser to commence an antitrust action against a manufacturer of the product. The Court had under consideration the enforcement of Section 4 of the Clayton Act (15 U.S.C. Section 15). Nothing within the statute nor the decision indicates an intent to extend the application of *Illinois Brick* beyond the context of a federal antitrust action. There is not even a hint that this Court sought to bar state court contract actions by a purchaser against its seller to recover a portion of the antitrust proceeds recovered by the seller from a manufacturer, where the contract between those parties created such right.

Since a congressional command mandating pre-emption is absent from the Clayton Act, and is not implicitly contained in its structure and purpose, exemption may only be upheld if the state and federal laws under consideration are so inconsistent that state law must give way. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526, reh. denied 431 U.S. 925 (1977). The test is "to determine whether, under the circumstances of this particular case, (the State's) law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Agreements not to sell or buy goods from particular persons are recognized trade restraint practices which both

state and national legislation can and do permit. *Giboney v. Empire Storage Co.*, 336 U.S. 490, 495 (1949).

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132, reh. denied; *Shell Oil Co. v. Governor of Maryland*, 439 U.S. 884 (1978), this Court held that Clayton Act Section 2(b) as amended by the Robinson-Patman Act was not intended by Congress to pre-empt states from regulating commerce and discouraging antitrust activities through state legislation stating that "This Court is generally reluctant to infer pre-emption..." *supra* p. 132. In the matter under consideration, by finding the doctrine of pre-emption applicable, the New York State Court of Appeals has acted in conflict with this decision.

Applying federal antitrust policy to this state court action, and pre-empting the courts of New York from applying their own policies, amounts in the words of Justice Lazer, in his dissent in the New York State Appellate Division, Second Department to "federal pre-emption of the antitrust laws by judicial act where it is conceded that there is no Congressional pre-emption." Acting under a misapprehension that it has been shackled by the Congress or by this Court, the New York Court of Appeals has refused to consider what would otherwise be a valid common law action for breach of contract and money had and received. This Court should, by granting certiorari, give consideration to whether those shackles should be unlocked and appropriate guidelines established defining the extent to which states are free to fashion their own antitrust policy as it applies to innocent purchasers within the distributive chain who bear the brunt of antitrust overcharges, although they did not buy directly from the guilty party.

There is a conflict between the decision rendered herein by the New York State Court of Appeals and various federal court of appeals decisions. In *The State of California v. California and Hawaiian Sugar Co.*, 588 F.2d 1270 (9th Cir. 1978), cert. denied 441 U.S. 932, the Court of Appeals specifically recognized that while indirect purchasers may have no federal cause of action in light of the *Illinois Brick* decision, they might still have a claim under the same facts under California law. The Court refused to foreclose such a state law claim and refused to exercise its removal jurisdiction finding it preferable to allow the state to settle the question under state law principles specifically holding that in this area, there is no federal pre-emption. Furthermore, in *Alton Box Bd. Co. v. Esprit DeCorp.*, 682 F.2d 1267 (9th Cir. 1982) an action was brought under California law by indirect purchasers against manufacturers who were at the same time being sued in the federal district court in Texas in an action which was a companion action to the antitrust action in which Dairylea became a claimant. The Circuit Court of Appeals refused to rule on the question of pre-emption, stating that the state court should make such determination and that if the pre-emption question was not finally settled in state court, "The manufacturers can obtain federal review by appealing to the Supreme Court pursuant to 28 U.S.C. 1257 (2)." What clearer statement could there be by a Circuit Court of Appeals that this court should ultimately determine the question of pre-emption petitioners now place before it?

If the majority opinion of the New York State Court of Appeals is correct and pre-emption is established, the validity of several state statutes regulating the relationship between indirect parties in the distributive chain becomes highly questionable. (Alabama Code, Section, 6-5-60 (6); Cal. Business and Professional Code Section 16750; Hawaii Rev.

Stat Section 480-14 (C); Illinois Ann. Stat. Ch 38, Sections 60-7 (2); Miss. Code Ann. Section 75-21-9; Wis. Stat. Ann Section 133.18 (1).

In order to bring uniformity and give guidance in the area, this Court should accept this case for review.

2. The New York State Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. That question is whether the exception to *Illinois Brick v. Illinois*, as previously discussed in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) preserving rights between an indirect purchaser and manufacturer where the indirect purchaser had a pre-existing cost plus contract with its seller also applies to an indirect purchaser who meets all other criteria, but whose contract is for clearly established requirements rather than a fixed amount. The *Illinois Brick v. Illinois*, decision 431 U.S. 720 at 732, at footnote 12 contains a reference to the case of a cost plus contract. Nowhere within that footnote does this Court indicate that to qualify under that exception the indirect purchaser must have purchased or agreed to purchase a fixed quantity of goods. A passing reference to such circumstances at 431 U.S. 735-736 has caused several courts to presume an absolute requirement that a contract for a fixed quantity be present and resulted in the rejection herein of the notion that a requirements contract suffices. Plaintiffs herein do not believe such rigidity reflects the intent of the *Illinois Brick* decision. What makes application of the fixed quantity requirement all the more frustrating to plaintiffs herein is that the product in question, the milk cartons, were but a small component of the overall finished product purchased by plaintiffs. The cost of the cartons was nominal as compared to the price of the milk, representing only one and a quarter per

cent (.0125) of the price. Defendant has received as its anti-trust damages for overcharges about five per cent of its container costs. The recovery plaintiffs now seek represents approximately .000625 of the total amounts billed plaintiffs by defendant. It is totally unreasonable to surmise that such a miniscule amount compared to the price of the complete product could have affected or varied the milk requirements of any dealer. In sum and substance the same certainty as to who suffered damage exists here as it does in the case of a cost or cost plus contract for a fixed quantity.

The opinion of the New York State Court of Appeals is in conflict with the decisions of several other federal courts of appeal. There are many decisions recognizing that the *Illinois Brick* exception is not limited to the narrow terms of the decision. In *Montreal Trading Ltd. v. Amax*, 661 F.2d 864, 867 (10 Cir. 1981), cert. denied 455 U.S. 1001 the Court recognized that the Supreme Court "has generally left it to the lower courts to formulate those limitations" on standing to sue under the exceptions to *Illinois Brick*.

In *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1164 (5th Cir. 1979), the Court upheld the right of an indirect purchaser who did not have a pre-existing cost contract for a fixed quantity to bring an action if appropriate proof of "a functional equivalent" of a pre-existing cost plus contract could be made out. The Court stated:

> "When the impact of an overcharge on a middle-man's pricing decision can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of

> overlapping liabilities as the result of the inconsistent verdicts in separate lawsuits."

With those areas of concern eliminated, an action may be maintained. Plaintiffs having met such criteria were improperly denied their day in Court by reason of the decision under review.

Respectfully Submitted,

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APPENDIX A

Remittitur *8187*

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

2 No. 435

Tip Top Farms, Inc.,

Appellant-Respondent,

v.

Dairylea Cooperative, Inc.,

Respondent-Appellant.

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and two other actions:
Park Lane Dairies, Inc. v. Dairylea
Jerome Dairy Co., Inc. v. Dairylea

The appellant/respondent in the above entitled appeal appeared by Marcus and Katz, Esqs.; Field, Lomenzo and Turret, P.C.;

The respondent appeared by Bond, Schoeneck and King, Esqs.

The Court, after due deliberation, orders and adjudges that the order is affirmed, without costs, for reasons stated in the opinion by Justice Isaac Rubin at the Appellate Division (114 AD2d 12). Question certified answered in the affirmative. Cross appeal by defendant as to Actions 2 and 3 dismissed.

without costs, upon the ground that defendant is not aggrieved by the order of the Appellate Division insofar as it affirmed the orders in those actions (CPLR 5511). Judges Simons, Kaye, Alexander and Titone concur. Chief Judge Wachtler and Judges Meyer and Hancock dissent in part and vote to modify by denying branches of defendant's motions for summary judgment in accordance with and for the reasons stated in the concurring in part and dissenting in part opinion by Justice Leon D. Lazer at the Appellate Division (114 AD2d 27-37).

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Queens County there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 16, 1986.

APPENDIX B

Opinion (RUBIN, J.; BRACKEN, EIBER, JJ., concurring)
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December 30, 1985

SUPREME COURT: APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

LAZER, J.P., BRACKEN, RUBIN and EIBER, JJ.

TIP TOP FARMS, INC.,

Appellant-Respondent,

—against—

DAIRYLEA COOPERATIVE, INC.,

Respondent-Appellant.

(Action No. 1)

PARK LANE DAIRIES, INC., et al.,

Appellants-Respondents,

—against—

DAIRYLEA COOPERATIVE, INC.,

Respondent-Appellant.

(Action No. 2)

JEROME DAIRY CO., INC.,

Appellant-Respondent,

—against—

DAIRYLEA COOPERATIVE, INC.,

Respondent-Appellant.

(Action No. 3)

APPEALS and CROSS APPEALS in (1) Action No. 1, from an order of the Supreme Court (Aaron F. Goldstein, J.), dated March 12, 1983, and entered in Queens County, which granted in part and denied in part that branch of defendant's motion which sought summary judgment dismissing the complaint, denied that branch of defendant's motion which sought leave to amend defendant's answer, and denied plaintiff's cross motion for partial summary judgment; (2) in Action No. 2 from an order of the same court, also dated March 12, 1983, which granted that branch of defendant's motion which sought summary judgment dismissing the complaint, denied that branch of defendant's motion which sought leave to amend defendant's answer and denied plaintiffs' cross motion for partial summary judgment; and (3) in Action No. 3, from an order of the same court, also dated March 12, 1983, which granted that branch of defendant's motion which sought summary judgment dismissing the complaint, denied that branch of defendant's motion which sought leave to amend defendant's answer, and denied plaintiffs' cross motion for partial summary judgment.

Marcus & Katz, Mineola, N.Y. (Lawrence K. Katz of counsel), for appellants-respondents Tip Top Farms, Inc. and Jerome Dairy Co., Inc.

Field, Lomenzo & Turret, P.C., New York, N.Y. (David A. Field and Burt Kesselman of counsel), for appellants-respondents Park Lane Dairies, Inc. and Park Dale Dairies, Inc.

Bond, Schoeneck & King, Syracuse, N.Y. (John M. Freyer, Ronald C. Berger and Janet H. Bliss of counsel), for respondent-appellant Dairylea Cooperative, Inc.

RUBIN, J. The common issue for appellate review in these three appeals is whether Federal antitrust policies bar indirect purchasers from obtaining, in an action to recover damages for a breach of contract or for money had and received, so much of a direct purchaser's recovery fund in a Federal antitrust action as represents illegal overcharges that had been passed on to the indirect purchasers pursuant to cost-plus pricing provisions in their requirements contracts with the direct purchaser.

Defendant Dairylea Cooperative, Inc. operates a milk pasteurizing plant in Queens County where it pasteurizes and packages milk and milk by-products for itself and other dealers. The plaintiffs are licensed milk dealers, who sell milk at wholesale in various counties in the metropolitan area.

Tip Top Farms, Inc. (Tip Top), the plaintiff in Action No. 1, alleges that defendant processed all its requirements for milk and milk products in 1973 and 1974 pursuant to an oral agreement which the parties entered into in October 1973. According to Tip Top, defendant agreed to supply it with all its requirements for packaged milk and milk products in exchange for a price that was based on three components: (1) the monthly price for raw milk established by the Federal Milk Market Administrator; (2) a charge for processing the raw milk, generally negotiated in the spring and fall of each year; and (3) defendant's cost for fiberboard milk cartons plus 1% as an allowance for plant loss. The parties allegedly agreed

that defendant's profit was to be solely derived from the cost of processing the raw milk. Pursuant to said agreement, defendant issued monthly announcements notifying Tip Top of all increases or decreases in the cost of milk, the cost of processing and the current cost for cartons. Tip Top would order from defendant all its requirements for packaged milk and milk by-products. Tip Top's requirements varied, and the agreement did not obligate it to purchase a fixed quantity. Furthermore, Tip Top alleges that the agreement was terminable at will by either party.

Plaintiffs in Action No. 2, Park Lane Dairies, Inc. (Park Lane) and Park Dale Dairies, Inc. (Park Dale), allege that they entered into a similar oral contract with defendant in 1969, and, pursuant to said agreement, they purchased all their requirements for packaged milk and milk products from defendant in the years 1971 through 1974. Plaintiff in Action No. 3, Jerome Dairy Co., Inc. (Jerome Dairy), also alleges that it entered into a similar oral agreement with defendant in December 1967, and that it purchased all its requirements for packaged milk and by-products from defendant during 1971 to 1974 in accordance with said agreement.

In approximately 1976, a Federal antitrust action was commenced against several manufacturers of fiberboard products. In violation of the Clayton Act (15 USC § 15), said manufacturers had allegedly conspired to fix prices and to allocate customers, resulting in illegal overcharges for their products, such as milk cartons, during the years 1960 to 1974. The United States District Court for the Northern District of Illinois certified a class which included direct purchasers from the manufacturer but excluded indirect purchasers further down in the chain of distribution (*see, In re Folding Carton*

Antitrust Litigation, 75 FRD 727). In 1979, the antitrust action was settled. The manufacturers, without admitting any liability, agreed to contribute to a settlement fund exceeding $200,000,000. Since Dairylea was a direct purchaser, it was included as a member of the plaintiff class in the antitrust action, and was notified in 1979 that it could submit a claim indicating its total purchases of fiberboard products from the defendant manufacturer during any four years between 1960 and 1974. Dairylea filed a claim based on its purchases of fiberboard products from defendant manufacturers during the years 1971 through 1974. Dairylea's claim was approved to the extent of $20,606,000. In April 1980, Dairylea received its proportionate share of the settlement fund in the form of $1,165,981.52 in cash, $29,100 in noninterest bearing promissory notes and a stock warrant entitling it to purchase 291 shares of Federal Paper Board Company, Inc.

Thereafter, plaintiffs commenced the instant actions in an attempt to recover a portion of the funds defendant Dairylea received in settlement of the antitrust action on a theory of breach of contract and on a theory of money had and received. Since Dairylea had passed on the milk carton manufacturer's overcharge to plaintiffs during the period of 1971 through 1974 by charging them, pursuant to their respective requirements agreements, the cost of the cartons plus 1%, plaintiffs reasoned that a portion of the proceeds of the antitrust settlement received by Dairylea represented a reduction of the cost of milk cartons which they purchased from Dairylea during that period. Therefore, plaintiffs contended that Dairylea was contractually obligated under the cost-plus provision of their oral contracts to refund said amount to them.

Special Term granted those branches of defendant's

motions which requested summary judgment dismissing the causes of action in plaintiffs' respective complaints which sought to recover, on either a breach of contract or money had and received theory, the proceeds defendant received in settlement of the antitrust litigation on the ground that recovery would undermine overriding Federal antitrust policies. We agree with Special Term.

ILLINOIS BRICK RULE AND POLICY CONSIDERATIONS

Clayton Act § 4 (15 USC § 15) provides that any person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore *** and shall recover threefold the damages by him sustained". In *Illinois Brick Co. v Illinois* (431 US 720, *reh denied* 434 US 881), the United States Supreme Court held that, aside from two narrow exceptions, an indirect purchaser had no cause of action against the manufacturer under Clayton Act § 4 to recover treble damages for an illegal overcharge on the theory that the overcharge had been passed on to the indirect purchaser by the direct purchaser in the distribution chain.

In so holding, the Supreme Court echoed the policy considerations it had expressed nine years earlier in *Hanover Shoe, Inc. v United Shoe Mach. Corp.* (392 US 481), when it ruled that an antitrust defendant could not assert as a defense to a claim for treble damages under Clayton Act § 4, that the plaintiff, a direct purchaser, had "passed on" the overcharge to a buyer further down in the chain of distribution, and, thus, had not sustained real economic injury.

One policy consideration voiced by the Supreme Court in *Hanover Shoe (supra,* p 493) as warranting a bar to the asser-

One policy consideration voiced by the Supreme Court in *Hanover Shoe (supra,* p 493) as warranting a bar to the assertion of "pass-on" defense was the "massive evidence and complicated [economic] theories" that would be injected into the litigation to prove the amount of the overcharge, if any, that was passed on. As noted by the *Hanover Shoe* court:

> "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable" (*Hanover Shoe, Inc. v United Shoe Mach. Corp., supra,* at pp 492-493).

The *Illinois Brick* court recognized that the same insurmountable evidentiary problems of tracing the effect of an overcharge on prices, sales, costs and profits would apply a fortiori to a case where passing on was used offensively (*Illinois Brick Co. v Illinois, supra,* at p 741) and "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge - from direct purchasers to middlemen to ultimate consumers" *(Illinois Brick Co. v Illinois, supra,* at p 737*).* The burdens that such attempts would impose on the effective enforcement of the antitrust laws gave rise to the second policy concern voiced by the United States Supreme Court in rejecting the use of pass-on theories to enable indirect purchasers to bring antitrust actions to recover treble damages for illegal overcharges absorbed by them.

Cognizant of the long-standing policy of encouraging vigorous private enforcement of the antitrust law (*see, e.g., Perma Life Mufflers, Inc. v International Parts Corp.,* 392 US 134, 139), the Supreme Court was of the opinion that both the defensive and offensive use of the "pass on" concept would "seriously undermine" the effectiveness of such suits (*Illinois Brick Co. v Illinois, supra,* at p 737):

> "The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery by injecting extremely

> complex issues into the case; at the same time such an apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement" (*Illinois Brick Co. v Illinois, supra,* at p 745).

Consequently, the *Hanover Shoe-Illinois Brick* rule is predicated in part on the perceived need to concentrate the recovery for illegal overcharges in direct purchasers in order to guarantee that there would be one group with an incentive to sue and enforce the antitrust laws (*see, Mid-West Paper Products Co. v Continental Group,* 596 F2d 573, 577-578, n 9, and at p 580, n 24).

Lastly, in *Illinois Brick,* the Supreme Court noted that if passing on were allowed offensively, but not defensively, antitrust defendants would face a serious risk of multiple liability. For example, if an indirect purchaser recovered treble damages for the percentage of the overcharge that had been passed on to him, the direct purchaser could still recover treble damages for the full amount of the overcharge because the defendant under the *Hanover Shoe* doctrine would not be allowed to assert pass-on of the overcharge as a defense. Consequently, unequal application of the pass-on concept would substantially increase the possibility of subjecting a defendant to inconsistent adjudications (*Illinois Brick Co. v Illinois,*

supra, at p 730).

PLAINTIFFS DO NOT FALL WITHIN EXCEPTIONS TO ILLINOIS BRICK RULE

In the instant case, unless plaintiffs fall within one of the circumscribed exceptions to the *Illinois Brick* rule, they cannot directly sue the manufacturers of fiberboard cartons to recover the overcharge which Dairylea had passed on to them pursuant to the cost-plus provision of their oral requirements contracts. Nor can plaintiffs recover said amount by suing Dairylea for a violation of the antitrust law merely because Dairylea has passed on the illegal overcharge, unless plaintiffs can show a conspiracy between the manufacturers and Dairylea to fix wholesale prices (*see, Reiter v Sonotone Corp.*, 486 F Supp 115; *Albrecht v Herald Co.*, 390 US 145, *reh denied* 390 US 1018; *Dr. Miles Medical Co. v Park & Sons Co.*, 220 US 373; *see also, State of New York v Dairylea Co-op, Inc.*, 570 F Supp 1213, 1215-1216; Dunfee, Privity in Antitrust: *Illinois Brick v Illinois*, 16 American Business Law Journal 107, 115, n 42). We note that the complaints do not allege such a conspiracy.

The two potential exceptions to the *Illinois Brick* holding are based on the elimination of the evidentiary complexities and uncertainties which arise in tracing the interaction of market forces in order to prove the amount of the overcharge that had been passed on through the distribution chain.

One exception permits an indirect purchaser to sue for treble damages when there is a "pre-existing, fixed-quantity, cost-plus contract" between the direct purchaser and the indirect purchaser (*Mid-West Paper Products Co. v Continental Group*, 596 F2d 573, 577, *supra*), because the "effect of

the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case" (*Illinois Brick Co. v Illinois, supra,* at p 736). In a market where demand is perfectly inelastic (unresponsive to changes in price) the indirect purchaser absorbs the entire overcharge; where demand is perfectly elastic (responsive to changes in price) the direct purchaser absorbs it. In all intermediate cases, the overcharge is apportioned between them (*see generally,* Comment, A Legal and Economic Analysis of the Cost-Plus Contract Exception in *Hanover Shoe* and *Illinois Brick*, 47 Univ Chicago L Rev 743, 746; Schaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm & Mary L Rev 883).* Under a cost-plus contract, a product is sold at a specified markup above the seller's own cost. An illegal overcharge is another of the direct purchaser's costs, which the indirect purchaser is committed to pay. Where the cost-plus contract is for a fixed amount, the indirect purchaser's demand for the product is completely inelastic because the indirect purchasers must buy the same quantity at the direct purchaser's price even though the price may vary with the direct purchaser's cost (*see, Lefrak v Arabian American Oil Co.*, 487 E Supp 808, 819; Schaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm & Mary L Rev 883, 892). Moreover, "the [direct] purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer [indirect purchaser] is

*A similar analysis applies when supply is either perfectly elastic or perfectly inelastic, except that perfect inelasticity results in the direct purchaser absorbing the entire overcharge, while perfect elasticity places the overcharge on the indirect purchaser (*see,* Schaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm & Mary L Rev 883, 887-897).

committed to buying a fixed quantity regardless of price" (*Illinois Brick Co. v Illinois, supra,* at p 736). Since a pre-existing fixed quantity, cost-plus contract renders the indirect purchaser's demand for the product perfectly inelastic, resort to tracing the interaction of market forces is unnecessary to prove the indirect purchaser has absorbed the illegal overcharge in its entirety. However, "where a fixed quantity does not exist, and an indirect purchaser is free to vary the amount of its purchases in response to price changes, the evidentiary problems incident to allocating the amount of the overcharges arise" (*Lefrak v Arabian American Oil Co., supra,* at p 819).

The clear dictate of *Illinois Brick* is that the cost-plus contract exception is to be narrowly construed (*see, Mid-West Paper Products Co. v Continental Group, supra,* at p 577, n 9; *Lefrak v Arabian American Oil Co., supra,* at p 818). A primary feature of the cost-plus contract which led the Supreme Court to cite this as a possible exception to *Illinois Brick* is a "commitment for a fixed quantity, precluding evidentiary complexities due to considerations of decreasing sales" (*International Assn. of Machinists v OPEC,* 477 F Supp 553, 562, *affd* 649 F2d 1354, *cert denied* 454 US 1163). Consequently, an indirect purchaser's informal week-to-week arrangements to buy varying quantities on a cost-plus basis (*see, Mid-West Paper Products Co. v Continental Group, supra,* at pp 577-578, n 9) and a requirements contract indexed to the distributor's cost (*see, Lefrak v Arabian American Oil Co., supra*) have been held insufficient to invoke this exception to *Illinois Brick* because there is no commitment to purchase a fixed quantity. Similarly, in the instant case, the alleged requirements contracts are not encompassed within this exception to *Illinois Brick* because plaintiffs admit that they were not obligated to buy a fixed

quantity. Moreover, according to plaintiffs, the contracts were terminable at will.

To demonstrate that the subject requirements contracts are not the functional equivalent of the cost-plus contract contemplated by this exception to *Illinois Brick*, it bears repeating that the direct purchaser will be able to shift a larger share of any overcharge imposed on him onto the indirect purchaser in a market where demand is more inelastic and the supply is more elastic. Conversely, the more elastic the demand and the more inelastic the supply, the greater the share of an overcharge the direct purchaser must bear himself (Comment, A Legal and Economic Analysis of the Cost-Plus Contract Exception in *Hanover Shoe* and *Illinois Brick*, 47 Univ Chicago L Rev 743, 746). Because Dairylea's product, packaged milk, is perishable, the supply is highly inelastic. Since there are some acceptable substitutes for packaged milk products and plaintiffs are not obligated to purchase a fixed amount from Dairylea, the plaintiffs' (wholesalers'), the retailers', and the ultimate consumers' demand for Dairylea's product is, to some extent, elastic. Consequently, in the usual market, the overcharge for milk cartons will be partially borne by both Dairylea and plaintiffs. How much of the overcharge Dairylea shifted onto plaintiffs and how much it absorbed, as evidenced by a loss in actual or potential sales volume or by adjustments in its charge for pasteurization, depended on the relative elasticities of supply and demand. Accordingly, any attempt to fit the subject requirements contract into the *Illinois Brick* cost-plus contract exception is misplaced because allocating the amount of the illegal overcharge for milk cartons which Dairylea passed on to plaintiffs cannot be ascertained without reference to complex market interactions of supply and demand.

A second exception to the *Illinois Brick* rule is a situation where "market forces have been superseded" because "the direct purchaser is owned or controlled by its customers" (*Illinois Brick Co. v Illinois, supra*, at p 736, n 16). Although Park Lane and Park Dale argue, for the first time on appeal, that Dairylea was their "purchasing agent" for milk cartons, there is nothing in the record to suggest that the relationship between plaintiffs and defendant was anything more than that of vendor and vendee. Each acted independently and made contract and pricing decisions according to its individual concerns. Primary characteristics of an agent-principal relationship are that the agent is placed in a position to affect or alter the legal relations between the principal and third parties in matters within the scope of the agency and that the principal has the right to control the conduct of the agent with respect to matters entrusted to it (*see, L. Smirlock Realty Corp. v Title Guar. Co.*, 70 AD2d 455, 464). Such is clearly not the situation at bar.

The principle that plaintiffs "'may not alter a remedy which exists solely by virtue of a statute is *** too well settled to require citation of authority' " (*see, Russo & Dubin v Allied Maintenance Corp.*, 95 Misc 2d 344, 348, quoting from *Sun Theatre Corp. v RKO Radio Pictures*, 213 F2d 284, 287). Here, plaintiffs seek to recover indirectly what they cannot recover directly. Since plaintiffs were barred in a Federal anti-trust action against the manufacturers from recovering treble the amount of the illegal overcharge for milk cartons that had been passed on to them, they now seek, in the guise of an action to recover damages for breach of contract and for money had and received, to recover the same damages in State court from a direct purchaser, who was allowed to recover the overcharge at issue in the Federal action. While such a suit would not expose the defendant-manufacturers in

the Federal antitrust action to multiple liability, to allow the indirect purchaser to recover from the direct purchaser the amount of the illegal overcharges that had been passed on to it, pursuant to a cost-plus requirements contract that did not fall within an exception to the *Illinois Brick* rule, would severely impair the private enforcement of the Federal antitrust laws.

EFFECT OF THIS SUIT ON ENFORCEMENT OF FEDERAL ANTITRUST LAWS

A major policy consideration in concentrating the full recovery for an illegal overcharge in the direct purchaser, rather than allowing every indirect purchaser potentially affected by the overcharge to sue only for the amount it could show was absorbed by it, is to ensure that a group of private-attorneys general will be available to deprive antitrust violators of the fruits of their illegality.

Private antitrust enforcement has two objectives: to compensate victims of antitrust violations (*e.g., Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 US 477, 485-486) and to deter the commission of such violations (*see, Hanover Shoe, Inc. v United Shoe Mach Corp.*, 392 US 481, 494, *supra; Sun Theatre Corp. v RKO Radio Pictures*, 213 F2d 284, 287, *supra; Illinois Brick Co. v Illinois, supra*). In elevating direct purchasers to a preferred position as private attorneys-general, the United States Supreme Court was aware that the *Illinois Brick* rule would, on occasion, create a windfall for the direct purchaser, who was able to recoup his economic loss in the marketplace by passing on the overcharge to its customers in the form of increased prices, and would fail to compensate those indirect purchasers who may have been actually injured by antitrust violations. Never-

theless, in the *Illinois Brick* court's view, in order to ensure effective enforcement of the antitrust laws, deterrence was the preferred objective.

The most important consideration from the standpoint of deterrence is not who receives the proceeds of any judgment levied against the antitrust violator (*see, Illinois Brick Co. v Illinois, supra,* at p 760 [Brennan, J.'s dissent]), but that there exists adequate incentives to bring an antitrust suit and prosecute it to judgment (*see also,* Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Law? An Economic Analysis of the Rule of *Illinois Brick,* 46 Univ Chicago L Rev 602, 608). The *Illinois Brick* rule was purposely designed to give the direct purchaser the maximum incentive to sue by allowing direct purchasers to recover treble the entire overcharge without subtracting the amount of that overcharge passed on to more remote purchasers.

In establishing standing rules which favored direct purchasers over indirect purchasers, the *Illinois Brick* court acknowledged that "direct purchasers sometimes may refrain from bringing a treble damage suit for fear of disrupting relations with their suppliers" (*Illinois Brick Co. v Illinois, supra,* at p 746). Several other courts and commentators have also recognized that a direct purchaser may not be hurt very much as a result of passing on an overcharge and, thus, may not wish to risk the breach of a long-standing supplier relationship for the chancy potential recovery of windfall damages (*see, e.g., In re Western Liquid Asphalt Cases,* 487 F2d 191, 198, *cert denied sub nom. Standard Oil Co. v Alaska* 415 US 919; *Bashes v General Motors Corp.,* 59 FRD 589, 598 [N. D. Ill. 1973]; Dunfee, "Privity in Antitrust: *Illinois Brick v Illinois,* 16 American Business Law Journal 107, 114;

Schaefer, Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 Wm & Mary L Rev 883, 913-914; Wheeler, Antitrust Treble-Damage Actions: Do They Work?, 61 Cal L Rev 1319, 1325; Note, The Effect of *Hanover Shoe* on the Offensive Use of the Passing-On Doctrine, 46 So Cal L Rev 98, 112; Harrison, *Illinois Brick:* The Death Knell of Ultimate Consumer Antitrust Suits, 52 St Johns L Rev 421, 453). In view of the fact the *Illinois Brick* rule allows only direct purchasers to recover damages for antitrust violations, it is our opinion that enforcement of Federal antitrust laws would be seriously impaired if the direct purchaser's incentive to bring an antitrust suit is reduced further by the prospect of having to defend this recovery fund against claims from its customers in a State action such as the one at bar. A direct purchaser confronted with the prospect of having to defend its recovery fund against the claims of its customers merely because the illegal overcharge had been passed on to its customers by reason of a cost-plus provision in a requirements contract may readily find the role of private attorney-general too burdensome to warrant the massive expenditure of time and money. The conclusion that such a suit necessarily weakens — and at the extreme eliminates — the incentive of the direct purchaser to act as a private attorney-general is derived from two economic observations. First, in the absence of a preexisting, fixed quantity, cost-plus contract or an indirect purchaser's ownership or control of the direct purchaser, the problem of apportioning damages among direct and indirect purchasers would be costly, due to the litigation expenses and complex evidentiary problems entailed in proving the amount of the overcharge that had been passed on to the indirect purchaser. Second, even if allocation problems could be solved without seriously depleting the recovery pool, after the recovery is divided among the direct purchaser's customers,

the amount of damages, if any, the direct purchaser is allowed to retain would be relatively small (*see*, Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*, 46 Univ Chicago L Rev 602, 608-615). The net effect is to significantly impair the direct purchaser's incentive to institute or prosecute a Federal antitrust action against his supplier or to file a claim in a pending class action for treble damages.

Furthermore, where a multitiered distribution system exists, as in this case, we note that indirect purchasers (plaintiffs, the milk wholesalers), like the direct purchaser (Dairylea, the pasteurizer), will often be able to pass on much of the cost of an unlawful price increase (illegal overcharge for milk cartons) to their cartons (the retailers), who, in turn, will pass it on to the ultimate consumer. Thus, allowing indirect purchasers (plaintiffs, the wholesalers) to recover from the direct purchaser the amount of the overcharge passed on to them may not substantially further the compensatory objective of the Federal antitrust laws (*see*, Landes & Posner, Should Indirect Purchasers Have Standing to sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*, 46 Univ Chicago L Rev 602, 608), whereas it may substantially impair the deterrence objective by reducing the recovery fund of the direct purchaser and correspondingly the latter's incentive to act as a private attorney-general.

In the instant case, plaintiffs, under the *Illinois Brick* rule, had no legal or equitable interest in the Federal antitrust settlement fund. Plaintiffs concede that Dairylea never specifically agreed to reimburse them for any illegal overcharge in the cost of milk cartons that had been passed along to them in the event Dairylea recovered the overcharges in a Federal

antitrust action against the milk carton manufacturers. A contrary allegation is belied by the fact that the parties' requirements agreements were made years before a class action on behalf of direct purchasers to recover treble damages under the Clayton Act § 4 was commenced against several manufacturers of fiberboard products and years before Dairylea filed a claim as a member of the class. Moreover, when defendant received its share of the settlement fund, plaintiff Jerome Dairy had ceased doing business. Therefore, this is not a situation involving a contract where the parties specifically agreed to distribute the proceeds of a contemplated antitrust judgment. In the latter case, the direct purchaser, in entering into such an agreement, would arguably have received some form of consideration to furnish it with the requisite incentive to file an antitrust claim, even if it took the form of an increase in the direct purchaser's good will. Here, based merely on the nature of a cost-plus pricing provision, plaintiffs plead an implied promise by Dairylea to pass along reductions in the cost of milk cartons, including funds it recovered in a Federal antitrust action for illegal overcharges that had been passed on to plaintiffs pursuant to the same cost-plus pricing provision. The artful pleading is an attempt to circumvent the *Illinois Brick* rule.

To reiterate, allowing plaintiffs to bring an action either for breach of contract or for money had and received against Dairylea for the purpose of recovering the amount of an illegal overcharge Dairylea passed on to them because their respective requirements contracts contained a cost-plus pricing provision, when said remedy is foreclosed by direct suit against the antitrust violator, would undermine effective enforcement of the Federal antitrust laws by substantially impairing the direct purchaser's incentive to act as private attorney-general. Accordingly, to the extent the cost-plus

pricing provision in the subject requirements contracts could be construed as an implied promise by Dairylea to remit to plaintiffs any portion of its antitrust settlement fund, as a purported reduction in the cost of milk cartons, it is violative of Federal antitrust policy. Consequently, Special Term correctly granted defendant's motion for summary judgment, dismissing plaintiff Tip Top's complaint, insofar as it seeks to recover the proceeds Dairylea received in settlement of the antitrust litigation, and dismissing the other plaintiffs' complaints in their entirety.

Two other issues must be briefly addressed. First, plaintiff Tip Top's complaint pleads an additional cause of action not alleged in the other plaintiffs' complaints. Tip Top alleges that from 1978 to 1980, Dairylea received discounts from the manufacturers of fiberboard cartons based on the volume of its purchases. Tip Top asserts that Dairylea breached the cost-plus provision of their agreement by failing to pass along the volume discounts received by Dairylea for the milk cartons Dairylea sold to Tip Top. With respect to this claim, Special Term correctly denied summary judgment because a factual issue exists as to the meaning of the cost-plus provision, i.e., whether defendant was to sell milk cartons to Tip Top at its current or its final cost. Second, defendant's motion to amend its answers to assert the Statute of Frauds defense was properly denied for reasons stated in the opinion of our learned brother Justice Lazer. As noted by Justice Lazer, Uniform Commercial Code § 2-201(1) is inapplicable because the milk cartons had already been delivered, accepted and paid for pursuant to the parties' oral agreements and General Obligations Law § 5-701(1) is inapplicable because the subject agreements were capable of performance within one year.

Accordingly, the orders appealed from should be affirmed.

BRACKEN and EIBER, JJ., concur.

L A Z E R, J.P. (concurring in part and dissenting in part).

I disagree with my colleagues' view that the dispositive issue on this appeal is whether the contract alleged by the plaintiffs falls within one of the exceptions to the rule in *Illinois Brick Co. v Illinois* (431 US 720). The issue is much broader, for it concerns the relationship between Federal antitrust policies and access to the State courts for the purpose of common-law actions. More specifically, however, we must determine whether the policies enunciated in *Illinois Brick* preclude an indirect purchaser of goods from bringing a State common-law action against the direct purchaser to recover damages for breach of contract or moneys had and received when the purpose of the action is recovery of a portion of the sums the direct purchaser received as a result of an antitrust suit against the manufacturer. Because I believe that *Illinois Brick* does not preclude State courts from adjudicating common-law contract disputes, I dissent insofar as I would modify the orders of Special Term by denying those branches of defendant's motions which were for summary judgment dismissing plaintiffs' claims to a share of defendant's antitrust settlement. I agree, however, that Special Term's denial of leave to amend defendant's answers and plaintiffs' cross motions for partial summary judgment should be affirmed.

I.

In *Illinois Brick Co. v Illinois (supra)*, the Supreme Court held that with certain limited exceptions an indirect purchaser of goods is not an injured person within the scope of the Clayton Act § 4 (15 USC § 15) and thus cannot sue the manufacturer of those goods for Federal antitrust violations. The principal reason enunciated by the court for its decision

to so narrowly construe the Federal statute was its fear that a contrary decision "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge - from direct purchasers to middlemen to ultimate consumers" (*Illinois Brick Co. v Illinois, supra,* at p 737). This, the Supreme Court believed, would "add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness" (*Illinois Brick Co. v Illinois, supra,* at p 737). Additionally, the court expressed its concern that to allow theoretically injured parties to join such Federal court actions would so increase the cost of bringing such actions and decrease the potential rewards that it might reduce the incentive to sue and thus "seriously impair this important weapon of antitrust enforcement" (*Illinois Brick Co. v Illinois, supra,* at p 745). Defendant contends, and the majority holds, that the policy enunciated by the Supreme Court applies outside the context of a Federal antitrust action and bars State-court action by an indirect purchaser against its seller to recover antitrust proceeds recovered by the Seller, even though the claim is based upon a contract between the indirect purchaser and the seller.

Clearly, Congress has not preempted the field of antitrust law by passage of the Federal antitrust statutes (*see, Jones v Rath Packing Co.,* 430 US 519, *reh denied* 431 US 925; *Cloverleaf Butter Co. v Patterson,* 315 US 148). A State remains free to regulate in the area of antitrust despite the existence of the Federal antitrust provisions, so long as the State statutes do not conflict with the Federal law. In response to *Illinois Brick,* several states have amended their antitrust laws to provide a remedy for indirect purchasers, *(see, e.g.,* Ala Code § 6-5-60[c]; Cal Business and Professional Code § 16750; Hawaii Rev Stat § 480-14 [c]; Illinois Ann Stat ch 38, §

60-7[2]; Miss Code Ann § 75-21-9; Wis Stat Ann § 133.18[1]), but the validity of these statutes remains a matter of debate (*compare State of California v Califoirnia & Hawaiian Sugar Co.*, 588 F2d 1270, 1273, *cert denied* 441 US 932 with *Russo & Dubin v Allied Maintenance Corp.*, 95 Misc 2d 344, 347 *and Matter of Wiring Device Antitrust Litigation*, 498 F Supp 79; *see*, Note, State Indirect Purchase Statutes: The Preemptive Power of Illinois Brick, 62 BUL Rev 1241; Note, Indirect Purchaser Suits Under State Laws: A Detour Around the *Illinois Brick* Wall, 34 Stan L Rev 203 [1981]; Cavanagh, The *Illinois Brick* Dilemma: Is There a Legislative Solution?, 48 Alb L Rev 273, 309-310 [1984]). That debate is not before us, however, because plaintiffs' claims are not derived from a right created by statute. Plaintiffs are purchasers pursuant to oral contracts of sale for cost plus 1%, who seek to recover from their seller in common-law actions to recover damages for breach of contract and for money had and received, amounts subsequently received by the seller which reduced the seller's cost for the goods.

I do not believe that the common-law claims of an indirect purchaser are preempted by Federal antitrust law. The Supreme Court is "generally reluctant to infer pre-emption" (*Exxon Corp. v Governor of Maryland*, 437 US 117, 132, *reh denied sub nom. Shell Oil Co. v Governor of Maryland*, 439 US 884) in the area of antitrust, even in the face of an arguable conflict. In this case, a finding of preemption requires the inference that the Supreme Court intends the policy it enunciated in *Illinois Brick* with reference to access to the Federal courts to extend beyond Federal antitrust actions. Such an inference is unjustified. Preemption can be found only if the State action sought to be prohibited is " 'an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress' " (*Jones v Rath Packing co., supra,* at p 526, quoting from *Hines v Davidowitz,* 312 US 52, 67).

In *Illinois Brick,* the Supreme Court was concerned solely with the proper interpretation and application of the Federal antitrust laws and the effect of that interpretation on the Federal courts, including the right of access to those courts to vindicate the rights of indirect purchasers. The court evinced no intention to preempt substantive State laws governing contracts or the traditional common-law remedies for enforcing valid contracts. That an indirect purchaser may not sue a manufacturer for Federal antitrust violations for reasons that relate to access to the Federal courts and diligent enforcement of a specific antitrust statute does not mean that a direct purchaser, who is entitled to bring such a suit, cannot agree to pass on the benefits of that suit to its customers. *Illinois Brick* spoke to the question of who can bring a Federal antitrust claim; it has no bearing on the validity of a contract for the subsequent disposition of the proceeds of such an action.

For the same reasons, *Illinois Brick* cannot be viewed as establishing a public policy which would prohibit enforcement of the contracts plaintiffs allege. Of course, "[a] contract which binds one of the parties to do that which is contrary to the policy of the state or nation is void" (*Matter of Rhinelander,* 290 NY 31, 39, quoting from *Matter of Hughes,* 225 App Div 29, 31, *affd* 251 NY 529), and if Dairylea's alleged promises to remit part or all of the antitrust settlements to plaintiffs are violative of the public policy of the United States, the contracts are illegal and cannot be enforced (*see, Silvera v Safra,* 79 Misc 2d 919; *Klein v D.R. Comenzo Co.,* 207 NYS2d 739; *Kaiser-Frazer Corp. v Otis & Co.,* 195 F2d 838, *cert denied* 344 US 856). Although the term "public

policy" is inherently vague and incapable of precise definition, it is generally accepted that for a contract to be void as violative of public policy it must either contravene a statute or some basic principle of common law (*see, Hartford Acc. & Indem. Co. v Village of Hempstead,* 48NY2d 218, 225; *F.A. Straus & Co. v Canadian Pacific Ry. Co.,* 254 NY 407) or its performance must in some significant way be injurious to an established public interest (*see, F.F. Proctor Troy Props. Co. v Dugan Store,* 191 App Div 684). An otherwise valid agreement should not be set aside on these grounds unless it is clearly repugnant to a strong public policy (*see, e.g., Cheatham v Cheatham,* 93 Misc 2d 576; *Kloberg v Teller,* 103 Misc 641; 21 NY Jur 2d, Contracts § 145). I see nothing in *Illinois Brick* that establishes a national policy which prohibits the direct purchaser of goods from promising to remit part or all of the proceeds of a Federal antitrust action to its customers simply because those customers were not themselves entitled to bring the antitrust action. Furthermore, I believe it is mistaken policy for the State judiciary to strain to perceive Federal bars to access to State courts in matters involving obligations arising under State common law.

The successful plaintiff in an antitrust action is naturally entitled to put the amount recovered to any lawful purpose it wishes. Patently, it is free to remit all or part of the amount recovered to its customers should it elect to do so, for example, to further good customer relations. I see no reason why it should not similarly be allowed, prior to commencing an antitrust suit that only it is authorized to bring, to contractually bind itself to remit all or part of the proceeds of such a suit to its customers. If plaintiffs' interpretation of the alleged oral agreements is correct, that is in effect what Dairylea has agreed to do. Such a contract is not violative of any preemptive public policy established in *Illinois Brick.*

Moreover, a State common-law action to enforce such an agreement can in no way serve to unduly complicate a prior Federal antitrust action for the simple reason that it is not a part of that Federal action. In short, to the extent there may exist contracts requiring Dairylea to remit to plaintiffs any portion of the antitrust settlement which constitutes a reduction in the cost of the milk cartons, Federal antitrust policy does not bar an action to recover that amount. *Illinois Brick* simply dealt with the application of the Federal antitrust laws in Federal courts; in no way does it limit or impair contractual rights enforceable by traditional State common-law actions (*see also, Caraway v Ford Motor Co.*, 148 F Supp 776).

For the same reasons, *Illinois Brick* would not bar an action for moneys had and received as an alternative to recovery upon the contract (*see, Darmsteadter v Tandberg of Amer.*, 104 AD2d 355). Although considered an action at law, a suit for moneys had and received is based upon equitable principles of unjust enrichment (*see, Federal Ins. Co. v Groveland State Bank*, 37 NY2d 252, 258; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 89). The essential elements of such an action are threefold: the defendant must have received moneys properly belonging to the plaintiff; the defendant must have been benefited thereby; and considerations of justice and good conscience preclude allowing the defendant to retain the moneys (*see, generally, Schank v Schuchman*, 212 NY 352, 358-359; 22 NY Jur 2d, Contracts § 451). Contrary to Dairylea's contention, it is not necessary that the defendant's initial possession of the moneys be wrongful (*Friar v Vanguard Holding Corp., supra*, at p 89; *see, Simonds v Simonds*, 45 NY2d 233, 242; *Baratta v Kozlowski*, 94 AD2d 454, 464). In the instant cases, plaintiffs have alleged all the necessary elements of such actions and Dairylea has

not met its burden of showing that plaintiffs cannot make out their cases. Accordingly, Dairylea is not entitled to summary judgment dismissing those claims.

II

Defendant's further argument is that regardless of *Illinois Brick*, the underlying contracts are void because they are not evidenced by sufficient writings to satisfy the requirements of the Statute of Frauds. As noted, Special Term denied those branches of Dairylea's motions which were for leave to amend its answers not because the delay in asserting the affirmative defense of Statute of Frauds had prejudiced plaintiffs (*see*, CPLR 3025[b]; *Surlack v Surlack*, 95 AD2d 371; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:6, p 477), but rather because it found the defense to be without merit. Dairylea has raised no objection to Special Term's decision to consider the merits of the proposed amendments on its applications for leave to amend. Indeed, in its brief, Dairylea has urged us to consider the merits of the defense. Moreover, since the applications for leave to amend were combined with applications for summary judgment, Dairylea had a full opportunity to present its proof on the issue. Accordingly, because we agree that Dairylea's Statute of Frauds defense is meritless, we need not determine whether it would prejudice plaintiffs to allow the amendment at this late date (*see, Goldstein v Brogan Cadillac Oldsmobile Corp.*, 90 AD2d 512; *Sharapta v Town of Islip*, 82 AD2d 350, 362, *affd* 56 NY2d 332; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:11, p 481).

The oral agreements concededly provide for the sale of

packaged milk and milk products by Dairylea to plaintiffs. In dispute is the proper interpretation of that portion of the contracts which required Dairylea to charge its costs plus 1% for the milk cartons it provided to plaintiffs. It is plaintiffs' position that these contractual provisions refer to Dairylea's final cost as reduced by the antitrust proceeds and rebates, whereas Dairylea maintains that these terms are limited to its costs as they appeared to be at the time of delivery. Dairylea contends that if these provisions are interpreted so as to require Dairylea to remiburse plaintiffs for amounts subsequently received by Dairylea which serve to reduce the cost of the cartons, the agreements are violative of both the Statute of Frauds provisions contained in Uniform Commercial Code article 2 (UCC 2-201[1]) and that of General Obligations Law § 5-701(a)(1). The Statute of Frauds contained in the Uniform Commercial Code is patently inapplicable to these oral agreements. UCC 2-201(3)(c) specifically provides that the statute does not serve as a bar to claims concerning goods that have already been delivered and accepted or paid for pursuant to an oral agreement, and the plaintiffs here seek to recover a purported overpayment for goods that have been both delivered and accepted *and* paid for. Hence, this section cannot bar plaintiffs' claims (*see, Fatato, Inc. v Decrescente Distr. Co.*, 86 AD2d 600).

No such ameliorative provision limits the applicability of General Obligations Law § 5-701(a) (1), the relevant part of which provides that absent sufficient written memoranda an oral agreement is void if it cannot be performed within one year from the making of the contract. Although complete performance by both parties will take a contract out of this statute (*i.e., Dodge v Crandall*, 30 NY 294; 56 NY Jur, Statute of Frauds §§ 304-305), it is well settled in New York that neither partial performance by both parties nor complete per-

formance by only one party will save an agreement that cannot be performed within a year (*see, e.g., Meyers v Waverly Fabrics, Div. of Schumacher & Co.*, 65 NY2d 75; *Montgomery v Futuristic Foods*, 66 AD2d 64). The doctrine of partial performance, which may in certain limited situations save a contract involving an interest in realty from the effects of the Statute of Frauds (*see, Anostario v Vicinanzo*, 59 NY2d 662; *Sleeth v Sampson*, 237 NY 69), is inapplicable actions at law based on a contract that cannot be performed within one year (*Wahl v Barnum*, 116 NY 87, 98; *Zimmerman v Zimmerman*, 86 AD2d 525; 56 NY Jr, Statute of Frauds § 297; *see*, Whitney, Contracts [6th ed], § 75, at p 241). Thus, if the instant contracts are incapable of performance within a year, they are void and plaintiffs' contract actions must fail.

The criteria for determining whether a contract is within the statute turn not on whether the contract is actually performed within the year, but rather on whether by its express terms or by necessary implication the agreement is one which cannot be performed within a year (*see, e.g., North Shore Bottling Co. v Schmidt & Sons*, 22 NY2d 171, 175-176; *Trustees of First Baptist Church v Brooklyn Fire Ins. Co.*, 19 NY 305, 307; 2 Corbin, Contracts [1950], § 444; 3 Williston, Contracts § 594 [3d ed]). The statute, moreover, is to be interpreted narrowly and applies only to those contracts "which by their very terms have absolutely no possibility in fact and law of full performance within one year" (*D & N Boening v Kirsch Beverages*, 63 NY2d 449, 454). Thus, if there exists any possibility, however remote, that the contract could be performed within a year, it is not within the statute and may be enforced if otherwise valid (*see, Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 265; *Warner v Texas & Pacific Ry.*, 164 US 418, 434). Nor, if the contract can in some manner be performed within a year, is it relevant that it may also "be capable of an indefinite con-

tinuance" (*Trustees of First Baptist Church v Brooklyn Fire Ins. Co., supra,* at p 307).

The contracts at issue here were contracts of indefinite duration which did not provide for termination at some specific time or upon the occurrence of a particular event. Thus, unless they were terminable without a breach and within a year by either party, or at least by Dairylea (*see, North Shore Bottling Co. v Schmidt & Sons, supra,* at p 177, n 3), the law would regard them as incapable of performance within a year and therefore within the Statute of Frauds (*D & N Boening v Kirsch Beverages, supra,* at pp 456-458; *Zupan v Blumberg,* 2 NY2d, 547). Plaintiffs, however, have provided affidavits by participants to the oral agreements originally entered into by the parties who declare unequivocally that the agreements were terminable at will. Dairylea, on the other hand, has sought to counter these evidentiary showings with affidavits by an employee who was not involved in negotiations with any of the plaintiffs until several years after the original agreements were entered into and who merely stated that to the best of his knowledge the agreements were not terminable at will. In the absence of any evidence contradicting plaintiffs' proof that the business relationships between the parties were terminable at will, there can be no merit to this aspect of Dairylea's belated attempt to raise the affirmative defense of Statute of Frauds.

Somewhat more persuasive at first perusal is Dairylea's remaining contention that even assuming the parties were otherwise free to terminate the contracts at will, if plaintiffs' interpretation of the contracts is correct, Dairylea could never completely perform the contracts because it would always be under a continuing obligation to remit to plaintiffs any amount it might receive at some later date which would

reduce the cost of the cartons it had previously sold to plaintiffs. This argument is flawed, however, because it turns the applicable criteria upside down. The test for determining whether a particular contract is within or without the statute is not whether some future event may occur which will render performance impossible within the year, but rather whether the contract by its own terms renders performance within a year impossible. If plaintiffs' interpretation is correct, the contracts at issue simply reuqired Dairylea to charge plaintiffs its cost for the milk cartons, plus 1%. There is nothing inherently impossible in determining the cost of goods within a year. As it happened—if plaintiffs' view of the contracts ultimately prevails—the cost of the milk cartons involved in these cases was subsequently reduced. This was not a necessary result of the terms of the contracts, however, but rather of the unanticipated antitrust recovery.

The contracts did not require Dairylea to purchase the milk cartons under conditions that would render it unable to determine their final cost for several years. Certainly, Dairylea was under an obligation to act in good faith and was required to purchase the goods in a reasonable manner for a fair price (*see*, 22 NY Jur 2d, Contracts § 258; *see generally*, *Clark v Fleischmann Vehicle Co.*, 187 NYS 807). The obligations imposed by such a contract were discussed by the First Department in *Title Guarantee & Trust Co. v Pam* 192 (App Div 268, 322, *affd* 232 NY 441, *rearg denied* 233 NY 530), which concluded that "[a] contract to do work upon a basis of cost plus a stipulated commission does not mean that the contractor has the right to expend any amount of money he may see fit upon the work, regardless of the propriety, necessity or honesty of the expenditure, and then compel repayment by the other party, who has confided in his integrity, ability and industry". None of the parties to the actions

suggest that this obligation would extend so far as to require Dairylea, assuming it acted reasonably in purchasing the cartons, to subsequently commence an antitrust action in order to decrease the cost of the goods. Rather, plaintiffs' contention is that having voluntarily acted to obtain the antitrust funds, Dairylea then became obligated to remit to plaintiffs that portion of the money attributable to cartons sold to plaintiffs. Dairylea may not transform a contract which could have been completely performed within a year into one incapable of performance within a year by unilateral actions not specifically required by the contracts but which may have the effect of resurrecting otherwise defunct contractual obligations. Indeed, even had the contracts required Dairylea to seek to reduce its costs by an antitrust action against the carton manufacturers, the contracts would nonetheless be outside the statute since it is not impossible—even if it is unlikely—that such a claim could be resolved within the year.

We emphasize that that contracts did not subject Dairylea to a continuing negative covenant which it would never be able to completely perform (*see, Meyers v Waverly Fabrics*, 65 NY2d 75, *supra; Shirley Polykoff Adv. v Houbigant, Inc.*, 43 NY2d 921). Instead Dairylea's obligation was terminable as soon as it delivered the goods and accurately determined its cost. Nor are these contracts analogous to those requiring an employer to pay an employee commissions on all sales to customers originally obtained by the employee even with respect to sales made after the employment relationship terminates, for in those cases the employer is not free to simply refuse to accept such future sale orders, and thus the termination of its obligations is subject to the whims of third parties (*see, Zupan v Blumberg*, 2 NY2d 547, 552, n, *supra; Nat Nal Serv. Stas. v Wolf*, 304 NY 332). In the instant cases, if plaintiffs' interpretation of the agreements is accepted,

Dairylea was unable to completely perform within the year only because it voluntarily brought an antitrust claim and thus purportedly became unable to determine its costs until it received the antitrust settlement. This time span was not a necessary result of any contractual obligations, however, and did not render the contracts incapable of performance within a year by their own terms. Indeed, Dairylea's argument would place almost every oral contract within the statute, since there always exists the possibility that some events will render performance within the year impossible and thus subject a party to a continuing obligation.

Since the oral agreements at issue here were susceptible of performance within a year, they are not subject to General Obligations Law § 5-701(a) (1). Accordingly, Special Term acted properly in denying Dairylea's applications for leave to amend its answers to include the affirmative defense of the Statute of Frauds. Because the contract actions are not barred by Federal antitrust policy, however, Special Term erred in granting Dairylea summary judgment dismissing plaintiffs' claims to a part of the antitrust settlements.

III

Finally, I conclude that plaintiffs are not entitled to partial summary judgment on any of their causes of action. Although the parties agree that they entered into contracts under which Dairylea was to provide the plaintiffs with milk cartons at cost plus 1%, they disagree sharply as to whether the term "cost" referred to Dairylea's "cost" at the time of sale or whether it required Dairylea to ascertain its final "cost" by deducting any amounts subsequently received by Dairylea and which were attributable to the purchase of the cartons it sold to plaintiffs. Nowhere in their affidavits in support of their cross motions

for partial summary judgments do the affiants declare that the question of reimbursement for subsequent negotiations or expressly provided for in the agreements. Rather, it is plaintiffs' position that such an interpretation is implicit in the agreements and is sustained by the custom and usage of the industry. Therefore, a plenary trial will be necessary to determine whether in fact the interpretation is implicit, whether there existed such a custom and usage in the industry when these contracts were negotiated, and, with respect to the claims to a portion of the antitrust settlement, whether that custom and usage is broad enough to encompass so unusual an event as a subsequent antitrust recovery. Thus, plaintiffs' cross motions were properly denied.

APPENDIX C

MEMORANDUM DECISION
(FOR THREE ACTIONS)
(PP 9-15)

SUPREME COURT QUEENS COUNTY
SPECIAL TERM, PART I

TIP TOP FARMS, INC.
VS.
DAIRYLEA COOPERATIVE, INC.

Index No. 13725/82
By GOLDSTEIN, J.
Dated January 18, 1983

PARK LANE DAIRIES, INC., et al.
VS.
DAIRYLEA COOPERATIVE, INC.

Index No. 13726/82

JEROME DAIRY CO., INC.
VS.
DAIRYLEA COOPERATIVE, INC.

Index No. 13727/82

The three above-captioned actions involve identical issues and will be disposed of in this one decision. In each action, the defendant has moved for leave to amend its answer and for summary judgment, and the plaintiffs have cross-moved for summary judgment.

The defendant operates a milk pasteurizing plant in the County of Queens, at which it pasteurizes and packages milk for itself and other milk dealers. The plaintiffs are licensed milk dealers who sell milk at wholesale in various counties in the metropolitan area. Plaintiff Tip Top Farms alleges that

pursuant to an oral contract entered into with defendant in October, 1973, defendant sold plaintiff milk and other products in 1973 and 1974. Plaintiff Jerome Dairy Co. claims that it purchased milk and other products from the defendant during 1971 to 1974 pursuant to an oral contract entered into in December, 1967. Plaintiff Park Lane Dairies, Inc., and plaintiff Park Dale Dairies, Inc., also allege that they made purchases of milk and other products from the defendant during 1971 to 1974 pursuant to an oral agreement reached in 1969.

In 1976, a class action entitled *"In Re Folding Carton Antitrust Litigation"* was brought in the Federal District Court for the Northern District of Illinois. The complaint alleged that the manufacturers of fiberboard products, such as milk cartons, conspired to fix prices and to allocate customers, resulting in illegal overcharges during the years 1960 to 1974. The Federal District Court certified a class which included direct purchasers from the manufacturer, but which excluded indirect purchasers further down in the chain of distribution (*In Re Folding Carton Antitrust Litigation*, 75 FRD 727). In 1979, a settlement of the class action was reached whereby each defendant manufacturer agreed to contribute to a settlement fund. Pursuant to a plan of distribution approved by the Federal District Court, defendant Dairylea filed a claim based on its purchases of fiberboard products from 1971 to 1974. Defendant Dairylea received from the settlement fund $1,165,981.52 in cash, $29,100 in promissory notes, and a stock warrant entitling it to buy 291 shares of Federal Paper Board Company, Inc.

The plaintiffs are attempting to reach part of these assets on the theory that the defendant is contractually obligated to make refunds to them. The plaintiffs allege that defendant

entered into oral contracts with them whereby defendant promised to supply them with milk and other products in cardboard containers. The contracts were for plaintiffs' requirements only and not for any fixed quantity. The plaintiffs further allege that defendant agreed not to profit from the containers themselves, but to charge the plaintiffs only what defendant itself paid for the containers plus one percent, representing plant loss. The defendant conceded that its oral agreements with the plaintiffs provided that containers would be sold to them at defendant's cost plus one percent. But defendant denies that it is obligated to make refunds because it recovered antitrust damages. The defendant insists that plaintiffs agreed to pay what was the cost of the containers at the time the products were sold.

Plaintiff Tip Top's complaint contains one cause of action which the three other plaintiffs have not asserted. Plaintiff Tip Top alleges that from 1978 to the present, the defendant has received discounts from the manufacturers of paper cartons based on the volume of its purchases. The plaintiff theorizes that the defendant breached the cost-plus contract by failing to pass along the volume discounts.

The first branch of defendant's motions seeks leave to amend the answers to plead section 5-701(a) (1) of the General Obligations Law and UCC 2-201(1). Section 5-701(a) (1) of the General Obligations Law provides that every agreement or promise not to be performed within one year from the making thereof is void unless evidenced by a writing subscribed by the party to be charged. UCC 2-201(1) provides essentially that a contract for the sale of goods for $500 or more is not enforceable unless there is some writing sufficient to indicate that a contract for sale has been made and signed by the party to be charged. The defendant theorizes that its

oral contract with the plaintiffs violated these statutes not only because more than $500 was involved, but also because the defendant could not fully perform within one year if it had to pass along refunds to the plaintiffs whenever they were received.

A court will usually not inquire into the merits of a proposed amendment pleading (see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025:11). However, an inquiry into the merits of the Statute of Frauds defense may be undertaken here because both sides have moved for summary judgment. The court holds that neither UCC 2-201(1) nor section 5-701(a) (1) of the General Obligations Law is available to the defendant. UCC 2-201(1) does not bar the instant actions because the products have been sold and paid for (UCC, § 2-201[3] [c]). Section 5-701 (a) (1) is applicable only to executory, not executed, contracts (see *L. Fatato, Inc. v DeCrescente Distributing Co., Inc.*, 86 AD2d 600; 56 NY Jur, "Statute of Frauds", § 326). In the cases at bar, the plaintiffs are essentially attempting to recover overcharges on executed contracts, and the Statute of Frauds is not a barrier to such claims (see *L. Fatato, Inc. v DeCrescente Distributing Co., Inc., supra;* 56 NY Jur, "Statute of Frauds", § 326).

Accordingly, those branches of defendant's motions which seek leave to amend its answer are denied.

Although plaintiffs have shown that the Statute of Frauds does not bar their actions, they still have the burden of proving the terms of their oral contracts (see 21 NY Jur, "Evidence", § 155). In order to be entitled to summary judgment, the plaintiffs must show that no issue of fact exists concerning the terms of their oral agreements (see *Sillman v*

Twentieth Century-Fox Film Corp., 3 NY2d 395). It is undisputed that defendant agreed to sell plaintiffs' cartons at cost plus one percent. However, this agreement is ambiguous since it may mean either that defendant was to sell at its current cost or that defendant was to sell at its final cost. Where a contractual ambiguity exists, it is proper to receive parol evidence and evidence of custom and usage in order to resolve the ambiguity (see *Stulsaft v Mercer Tube and Manufacturing Co., supra; O'Connor-Sullivan, Inc. v Otto, supra).*

Accordingly, that branch of defendant's motion which seeks summary judgment dismissing that part of plaintiff Tip Top's complaint concerning the volume discounts is denied, and plaintiffs' cross motions for summary judgment are denied.

The court must next inquire whether plaintiffs' claims to part of the antitrust settlement received by defendant are barred by the rule and policies announced by the Supreme Court in *Illinois Brick Co. v State of Illinois* (431 US 720). Section 4 of the Clayton Act (15 USC, § 15) allows recovery of treble damages by any person who is injured in his business or property by anything forbidden in the antitrust laws. The party "injured in his business or property" within the meaning of that section is, with some narrow exceptions, the direct purchaser from the antitrust violator and not indirect purchasers in the chain of manufacture or distribution (*Illinois Brick Co. v State of Illinois, supra; Hanover Shoe, Inc. v United Shoe Machinery Corp.*, 392 US 431). With some narrow exceptions, an indirect purchaser cannot recover treble damages from an antitrust violator on the theory that the overcharges paid by a direct purchaser were

passed on to the indirect purchaser (*Illinois Brick Co. v State of Illinois, supra*). The Supreme Court reached this conclusion in order to promote judicial economy and the efficient operation of the antitrust laws. In order to determine the extent of the injury inflicted on an indirect purchaser by an antitrust violator, complex forces at work within the marketplace would have to be analyzed. "Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." (*Hanover Shoe, Inc. v United Shoe Machinery Corp., supra*, p 493).

There are a few exceptions to the rule that an indirect purchaser cannot sue an antitrust violator for treble damages. In the case at bar, the plaintiffs have attempted to bring themselves within the exception that allows an indirect purchaser who had a fixed quantity, cost-plus contract with his direct purchaser to sue the antitrust violator for treble damages (see *Illinois Brick Co. v State of Illinois, supra; Mid-West Paper Products Co. v Continental Group, Inc.*, 596 F2d 573; *Lefrak v Arabian American Oil Co.*, 487 F Supp 808). The Supreme Court explained the exception as follows: "In such a situation, the [direct] purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." (*Illinois Brick Co. v State of Illinois, supra*, p 736). But in the cases at bar, the plaintiffs had only requirements contracts with the defendant, not fixed quantity contracts, and thus they cannot bring themselves within an exception to the indirect purchaser rule (see *Lefrak v Arabian American Oil Co., supra*, fn. 21). The

plaintiffs could not reach the antitrust settlement received by defendant, even on a contract theory, without undermining the rule and policies announced in *Illinois Brick Co. v State of Illinois (supra).*

Accordingly, the defendant is granted summary judgment dismissing plaintiff Tip Top's complaint insofar as it concerns the proceeds received in settlement of the antitrust litigation. The defendant is also granted summary judgment dismissing the complaints of the other plaintiffs.

Submit order.

_____

J.S.C.

Supreme Court, U.S.
FILED
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No. 86 1484

IN THE

Supreme Court of the United States

October Term, 1987

TIP TOP FARMS, INC.,

Petitioner,

v.

DAIRYLEA COOPERATIVE INC.,

Respondent.

JEROME DAIRY, INC.,

Petitioner,

v.

DAIRYLEA COOPERATIVE INC.,

Respondent.

PARK LANE DAIRIES, INC. and PARK DALE DAIRIES, INC.,

Petitioners,

v.

DAIRYLEA COOPERATIVE INC.,

Respondent.

(Continued on inside cover)

18 pp

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

1. May a state court bar an indirect purchaser from proceeding against a direct purchaser on theories of implied contract and money had and received to recover a portion of an antitrust recovery obtained by the direct purchaser from an antitrust violator when the indirect purchaser is prevented from recovering directly from the antitrust violator under principles enunciated by this Court in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)?

2. Does a requirements contract under which the purchaser is not obligated to purchase a fixed quantity of goods fall within the "cost-plus" exception recognized in *Illinois Brick*?

STATEMENT OF AFFILIATIONS

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondent Dairylea Cooperative Inc. states that it has three wholly-owned operating subsidiaries, Hudson Valley Dairy Distributors, Inc., Sunny Valley Farms, Inc. and Agri-Service Agencies, Inc. Dairylea has other subsidiaries but they are all non-operating companies.

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STATEMENT OF FACTS

These three state-court actions, each commenced in late 1980, involve nearly identical factual allegations and theories of recovery. Each of the petitioners is a milk dealer which purchased processed milk and milk products from respondent Dairylea Cooperative Inc. ("Dairylea") at various times from 1960 to 1981. Each petitioner seeks to recover a portion of a monetary settlement received by Dairylea in 1980. The settlement arose out of an antitrust class action entitled *In Re Folding Carton Anti-Trust Litigation* commenced in the United States District Court, Northern District of Illinois. The defendants in that class action were fiberboard manufacturers who conspired from 1960 to 1974 to fix the prices of folding cartons and to allocate customers among themselves.

Dairylea was a member of the plaintiff class in the antitrust action and was notified in 1979 that the fiberboard manufacturers had consented to settle the action for approximately $200 million. Dairylea was instructed to submit a claim based upon its fiberboard purchases from the antitrust defendants in any four years from 1960 to 1974. Dairylea thereupon submitted a claim to the Federal District Court which showed the dollar amount of its total purchases of fiberboard containers in the years 1971 - 1974, inclusive.

Dairylea's claim was accepted by the District Court after being modified by an Administration Committee appointed by the Court. In early 1980, Dairylea received its portion of the final antitrust settlement in the form of (1) a check in the amount of $1,165,981.52; (2) two non-interest bearing subordinated promissory notes due October 18, 1983 in the amounts of $29,000 and $100, respectively; and (3) one warrant certificate entitling Dairylea to purchase 291 shares of common stock of Federal Paperboard Company, Inc.

Petitioners commenced these actions in New York Supreme Court seeking to obtain a share of Dairylea's settlement recovery. Each of the petitioners alleged that it had an oral contract with Dairylea to purchase milk and milk products from Dairylea in cardboard containers. The price of the packaged milk, it was alleged, contained a separate component charge for the containers which was equal to Dairylea's cost of the containers plus 1%. Petitioners claimed that oral communications between them and Dairylea established that petitioners would be reimbursed for amounts received by Dairylea reducing its cost of the containers.

Petitioners conceded that there was no express agreement by Dairylea to remimburse them for any retroactive adjustments in the cost of the cardboard cartons. They instead sought to *imply* such an obligation from the oral contracts based solely on the fact that the cartons were to have been sold at Dairylea's cost plus 1%. An antitrust recovery of overcharges, petitioners admitted below, was not even within the contemplation of the parties when they entered into their oral arrangements.

The complaints of the respective petitioners alleged causes of action for an accounting, for breach of contract, and for monies had and received. Petitioners later abandoned their causes of action for an accounting.

Dairylea moved in 1982 to amend its answers, and for summary judgment dismissing the respective complaints. Each of the petitioners cross-moved for summary judgment.

The New York Supreme Court, Queens County, granted Dairylea's motions for summary judgment upon the ground that a recovery by the petitioners would frustrate federal antitrust policy as enunciated by the U.S. Supreme Court in *Illinois Brick*. Each of the complaints was dismissed in its entirety (except a portion of the complaint in the action by petitioner Tip Top Farms, Inc. which sought to recover a portion of manufacturers' discounts allegedly received by Dairylea).

The New York Supreme Court, Appellate Division, Second Department affirmed the grant of Dairylea's motions for summary judgment. *Tip Top Farms, Inc. v. Dairylea Cooperative Inc.*, 114 A.D.2d 12, 497 N.Y.S.2d 99 (2d Dept. 1985) (Appendix B to Petitioners' Petition). The Appellate Division concured in the conclusion that maintenance of these actions would violate policies expressed by the U.S. Supreme Court and would frustrate the enforcement of the antitrust laws by private litigants.

The New York Court of Appeals affirmed the order of the Appellate Division for reasons stated in the opinion of the Appellate Division. *Tip Top Farms, Inc. v. Dairylea Cooperative Inc.*, 69 N.Y.2d 625, 511 N.Y.S.2d 227 (1986) (Appendix A to Petitioners' Petition).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI.

POINT I

THE COURTS BELOW APPLIED WELL SETTLED RULES OF FEDERAL PREEMPTION WHICH NEED NOT BE REVIEWED BY THIS COURT.

Congress has not, as petitioners point out, completely displaced state regulation in the antitrust area. However, even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L. Ed.2d 664 (1982). When it is impossible to comply with both state and federal law or where state law stands as an obstacle to accomplishment of the full purposes and objectives of Congress, state law is preempted. *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248, 104 S. Ct. 615, 621, 78 L.Ed.2d 443 (1984).

These general principles apply equally to state-created remedies and causes of action. If a state remedy is inconsistent with the policies of a federal law, a plaintiff will be prohibited from recovering on the state cause of action. *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225, 84 S. Ct. 784, 11 L.Ed.2d 661 (1964); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. den.*, 55 U.S.L.W. 3474, 107 S. Ct. 907, 93 L.Ed.2d 857 (1987).

The New York courts properly recognized the conflict between petitioners' state common law action and federal law and policy. Petitioners' causes of action based on common law implied contract and money had and received clash with the objectives of federal antitrust law and policy as interpreted by this Court in *Illinois Brick*.

The maintenance of these actions by petitioners would reduce, if not destroy, the effectiveness of the private treble damage action as a viable means of enforcing the antitrust laws. No direct purchaser hereafter would be willing to commence or participate in a treble damage action, and incur the costs and expenses associated with such an action, if it knew that its customers could turn around and lay claim to all of the recovery on the basis of an implied contract or on an equitable theory of money had and received.

This threat to the enforcement of the antitrust laws was aptly observed by the New York Supreme Court, Appellate Division, below:

> A direct purchaser confronted with the prospect of having to defend its recovery fund against the claims of its customers merely because the illegal overcharge had been passed on to its customers by reason of a cost-plus provision in a requirements contract may readily find the role of private Attorney General too burdensome to warrant the massive expenditure of time and money. The conclusion that such a suit necessarily weakens - and

> at the extreme eliminates - the incentive of the direct purchaser to act as a private Attorney General is derived from two economic observations. First, in the absence of a preexisting, fixed quantity, cost-plus contract or an indirect purchaser's ownership or control of the direct purchaser, the problem of apportioning damages among direct and indirect purchasers would be costly, due to the litigation expenses and complex evidentiary problems entailed in proving the amount of the overcharge that had been passed on to the indirect purchaser. Second, even if allocation problems could be solved without seriously depleting the recovery pool, after the recovery is divided among the direct purchaser's customers, the amount of damages, if any, the direct purchaser is allowed to retain would be relatively small (*see* Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick,* 46 U Chi L Rev 602, 608-615). The net effect is to significantly impair the direct purchaser's incentive to institute or prosecute a Federal antitrust action against his supplier or to file a claim in a pending class action for treble damages.

Tip Top Farms, Inc. v. Dairylea Cooperative Inc., 114 A.D.2d at 24-25, 497 N.Y.S.2d at 106-107 (Appendix B at B17-B18).

The dangers inherent in permitting petitioners to proceed cannot be more succinctly stated. A direct purchaser would have little incentive to initiate or participate in an antitrust action if it is compelled to pay over the recovery to those further down the distribution chain, all the while incurring litigation expenses in determining which indirect purchaser gets how much. The private enforcement of the antitrust laws would be dealt a major blow if actions such as these were permitted to go forward.

POINT II

PETITIONERS' RELIANCE ON THE COST-PLUS EXCEPTION RUNS COUNTER TO THE HOLDINGS OF THIS COURT AND OTHER FEDERAL COURTS.

The petitioners have sought to invoke an exception to the prohibition against the use of the "passing on" theory which was recognized in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), and in *Illinois Brick*. The exception applies to indirect purchasers who purchase their goods pursuant to a pre-existing "cost-plus" contract for a *fixed quantity* of goods. This exception was created because the difficulties associated with proving the "passing on" theory are less significant when the goods are purchased under a fixed quantity cost-plus contract. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, 88 S. Ct. 2224, 2232, 20 L. Ed 2d 1231 (1968). Sellers under fixed quantity cost-plus contracts are insulated from any decrease in sales as a result of attempting to pass on overcharges because customers under such contracts are committed to buying a fixed quantity regardless of price. Thus, the effect of the overcharge is determined in advance, without reference to the interaction of supply and demand that complicates the determination in the ordinary case. *See Illinois Brick Co. v. Illinois,* 431 U.S. at 736, 97 S. Ct. at 2069-70.

The courts have been unanimous in holding that a "fixed quantity commitment" is essential to establishing the cost-plus exception. *Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 822 (E.D.N.Y. 1980); *see also Mid-West Paper Products Co. v. Continental Group,* 596 F.2d 573, 576-77 (3d Cir. 1979); *In Re Midwest Milk Monopolization Litigation,* 529 Supp. 1326, 1332 (W.D. Mo. 1982), *aff'd,* 730 F.2d 528 (8th Cir. 1984), *cert. den.,* 469 U.S. 924, 105 S. Ct. 306, 83 L.Ed.2d 240; *Int'l Ass'n of Machinists v. OPEC,* 477 F. Supp. 553, 562 (C.D.Cal. 1979), *aff'd,* 649 F.2d 1354 (9th Cir. 1981), *cert. den.,* 454 U.S. 1163, 102 S. Ct. 1036, 71 L.Ed.2d 319.

A requirements contract is the antithesis of a fixed quantity contract inasmuch as a buyer's requirements will vary with supply and demand. Since demand is affected by increases in price, requirements contracts lack the certainty of fixed quantity contracts.

The lack of a fixed quantity commitment in petitioners' requirements contracts makes it impossible to determine with any degree of certainty how much of the fiberboard manufacturers' price overcharges were passed along to petitioners. Because demand for milk is elastic, and because petitioners were not required to purchase fixed quantities of milk, Dairylea was not insulated from decreases in sales due to the manufacturers' higher prices, and could well have -- and indeed did -- absorb some of the overcharges itself. To what extent Dairylea absorbed the overcharges is an issue which gives rise to "evidentiary complexities due to considerations of decreasing sales", *Int'l Ass'n of Machinists v. OPEC*, 477 F. Supp. at 562, which is precisely what the cost-plus exception was intended to avoid.

The New York courts properly applied this Court's analysis of the narrow scope of the cost-plus exception to *Hanover Shoe* and *Illinois Brick*. This Court need not review an issue it has fully explicated in prior decisions and on which the lower courts have unanimously agreed.

POINT III

THE FACT THAT OTHER STATE LEGISLATURES HAVE CREATED A STATUTORY REMEDY FOR INDIRECT PURCHASERS IS IRRELEVANT.

Petitioners point out that legislatures in some states have created a remedy under state law for indirect purchasers. Although the validity of those statutes has been questioned (*see* Note, *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick*, 62 B.U.L. Rev. 1241; Note, *Indirect Purchaser Suits Under State*

Laws: A Detour Around the Illinois Brick Wall, 34 Stan. L. Rev. 203 (1981); Cavanagh, *The Illinois Brick Dilemma: Is There A Legislative Solution?,* 48 Alb. L. Rev. 273 (1984)), those statutes have no bearing on this case. What other state legislatures have done in regard to indirect parties is irrelevant. Those statutes are not at issue here and their validity was not addressed in the opinion below.

POINT IV

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE CITED DECISIONS OF THE NINTH CIRCUIT.

Petitioners cite a conflict between decisions in the Ninth Circuit and the New York Court of Appeals decision in this case. No such conflict exists. In *Cal v. Cal. & Hawaiian Sugar Co.,* 588 F.2d 1270 (9th Cir. 1978), *cert. den.,* 441 U.S. 932, 99 S. Ct. 2052, 60 L.Ed.2d 660 (1979), the Ninth Circuit stated that it is possible under state law that an indirect purchaser might have a viable cause of action. The court recognized that states should be free to settle the question. New York courts have settled the question in the instant case by determining that the facts of this case preclude a state court action sounding in implied contract.

Nor is *Alton Box Bd. Co. v. Esprit De Corp.,* 682 F.2d 1267 (9th Cir. 1982), in conflict with the decision in the instant case. In *Alton Box,* the court stated that the manufacturers could properly raise the *Illinois Brick* preemption issue as a defense to an action based upon state law. *Id.* at 1274. Furthermore, the court recognized the possibility that the indirect purchasers' claim may be preempted by federal law. The Ninth Circuit did not hold that state law claims could not be foreclosed by *Illinois Brick.*

The New York Court of Appeals made clear that not all common law breach of contract claims are barred by *Illinois Brick,* but it properly held that, in the absence of an *express agreement,* an

indirect purchaser under a requirements contract could not bring an action to recover its pro rata share of antitrust damages from the direct purchaser. This holding does not conflict with the cited decisions of the Ninth Circuit.

POINT V

THE RULING OF THE NEW YORK COURT OF APPEALS HAS LIMITED IMPACT DUE TO THE PARTICULAR FACTS INVOLVED.

The petition for a writ of certiorari should be denied since it is improbable that similar questions of law will arise in the future. The preemptive effect of *Illinois Brick* on state law remedies arises only due to the presence of the following facts and circumstances:

(a) Petitioners and Dairylea entered into an oral agreement whereby Dairylea agreed to supply petitioners their requirements of milk in cardboard milk containers on a cost-plus basis;

(b) The oral agreement, by petitioners' admission, did not contemplate Dairylea's receipt of price overcharges based upon its prior purchases of cardboard cartons and did not expressly provide for Dairylea to share its recovery with petitioners;

(c) Years after the sale of the milk in question, Dairylea recovered a portion of a monetary settlement settling a price fixing action against cardboard manufacturers; and

(d) The antitrust settlement did not delineate how much of the settlement was attributable to price overcharges and how much was attributable to treble damages and costs.

In order for the issues involved in this action to arise again in the future, each of the foregoing facts must be present. Because of the particular facts underlying this action, it is unlikely that this

issue will recur frequently in the future. Accordingly, the ruling below will have limited effect and applicability, and need not be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. The New York courts properly recognized that petitioners were seeking to accomplish indirectly what this Court prevented them from doing directly, namely, recovering for overcharges resulting from the manufacturers' price-fixing conspiracy.

Respectfully submitted,

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